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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 199

AMERICAN UNION TRANSPORT, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,

and

FEDERAL MARITIME BOARD,
Respondents,

RIVER PLATE & BRAZIL CONFERENCES, *et al.*,
Intervener-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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July 22, 1958

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, American Union Transport, Inc., respectfully prays for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the final judgment of that court entered April 24, 1958.

A certified transcript of the record in this case is filed with this petition, in accordance with Rule 21 of the rules of this Court.

Opinions Below

The opinion of the Court of Appeals for the District of Columbia Circuit (not yet reported) is annexed to this petition as Appendix A. It affirms an order of the Federal Maritime Board dated March 25, 1957. The opinion of the Federal Maritime Board in support of its order of March 25, 1957, is annexed to this petition as Appendix B. The material portions of the Board's opinion and order denied petitioner's claim for reparation under sections 15 and 22 of the Shipping Act, 1916 (46 U. S. C. 814, 821).

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 24, 1958. The jurisdiction of this Court is invoked under section 1040 of Title 5, and section 1254 of Title 28, United States Code.

Questions Presented

1. Where the Federal Maritime Board found that ocean carriers who were members of a conference and subject to the Shipping Act unlawfully agreed to withhold (and did withhold) freight brokerage from an ocean forwarder to punish him for prior acts of competition, was not the Board required to award reparation for the forwarder's injury?

2. Where a conspiracy is organized and executed in express transgression of a statutory mandate, are the recoverable damages limited to those which flow from infringement of a contract right?

3. May the Federal Maritime Board—without notice or hearing in an adjudicatory case—retroactively outlaw

under section 16 of the Shipping Act (46 U. S. C. 815) a claim for freight brokerage which is sanctioned by the Board's prior rules and decisions and by established custom and usage of the trade?

Statutes Involved

Sections 15, 16, and 22 of the Shipping Act, 1916, (46 U. S. C. 814, 815, 821) are set forth in Appendix C hereto annexed.

Statement of the Case

(a) Prior Proceedings

This petition seeks review of an order of the Court of Appeals for the District of Columbia Circuit which affirmed an order of the Federal Maritime Board denying reparation to the petitioner for injuries sustained in consequence of a conspiracy found by the Board to be unlawful. The proceedings in which the Board's order was entered were inaugurated by complaint which petitioner filed with the Board under section 22 of the Shipping Act, 1916 (46 U. S. C. 821), alleging a violation of section 15 of the same Act (46 U. S. C. 814) by a conference of ocean carriers. The same carriers (respondents in the proceedings before the Board) intervened in the review proceedings initiated by petitioner in the Court below under 5 U. S. C. 1032. They are hereafter collectively called the Conference.

The Conference filed an answer to petitioner's complaint before the Board, and the case was heard by a hearing examiner. The hearing examiner filed a recommended decision (R. 51-76)[1] supporting petitioner with respect to all but a minor portion of its claim.

[1] Record citations are to the page numbers in the Joint Appendix which has been certified to this Court.

Exceptions to the hearing examiner's report were filed with and argued before the Board, which (a) affirmed the examiner's finding that the Conference had violated the anti-conspiracy provisions of the Shipping Act, but (b) rejected the examiner's recommendation that reparation be awarded for petitioner's damages. (The Board also ordered the Conference to desist from the practices of which petitioner complained, but that portion of the order was without effect because it related exclusively to completed transactions.)

The Board, while finding a violation of the Shipping Act, denied reparation on two grounds, both of which petitioner contests: (a) that payment of brokerage to petitioner would have constituted a violation of section 16 of the Shipping Act (46 U. S. C. 815) (Appendix B, pp. 11-12); and (b) that petitioner had not "earned" the brokerage withheld (Appendix B, pp. 12-13).

Although the Board found two violations of the Shipping Act (one by the Conference, one by petitioner), it announced that because of "want of clarity in prior Board decisions," it would not certify either violation to the Department of Justice (Appendix B, pp. 13-14), although the examiner had recommended that the conduct of the Conference (but not of petitioner) be so certified (R. 76).

(b) The Injury to Petitioner

Petitioner is engaged in the shipping business as a ship owner, charterer, and freight forwarder (R. 93-4, Appendix B, p. 3). It is not a member of the Conference.

In 1952, petitioner made an offer to the Central Railroad of Brazil to transport 120 locomotives to Brazil (R. 94-5). The Conference, on behalf of its members, also quoted a rate, which was lower than the rate petitioner had quoted.

The Central Railroad accepted the Conference rate, and later made presumptive but not conclusive designation of Lloyd Brasileiro (one of the Conference lines) to perform the transportation (R. 159-60).

The Conference lines, despite the uniformity of their rates, remained in competition with each other for the business (R. 145) and several lines solicited such business from petitioner and thereby secured bookings of locomotives for their own vessels (R. 174-6a).

Although petitioner was unsuccessful in its bid for the transportation, it was designated by the Central Railroad "as brokers" to arrange for and supervise the shipment of the locomotives (R. 155-6). In this capacity, petitioner would, by undeviating custom and usage of the trade, have ordinarily received from the carriers (Appendix A, p. 41; Appendix B, pp. 7, 9; R. 130-1) a brokerage commission of 1¼% of the freight.

In this instance, however, the Conference carriers resolved to punish petitioner for having made an offer to carry the locomotives in a trade which the Conference deemed to be peculiarly its own.[2] After learning that petitioner had been appointed broker or forwarder, the Conference chairman on June 11, 1952, called a special meeting for June 12th—

> ". . . to determine whether or not Brokerage shall be paid to American Union Transport Company, its agents, subsidiary or associated companies on the 120 Locomotives closed in Rio with the Central Railroad of Brazil for which, we are informed, the American Union Transport now has been appointed freight forwarder.

[2] The petitioner's offer to carry the locomotives as a principal was made before its designation as broker or forwarder (R. 95, 154-6) and involved no breach of any fiduciary relationship.

"In view of the fact that the American Union Transport Company and/or its associates negotiated for these locomotives as a competitor carrier, underquoting existing Conference rates, forcing the Conference to markedly reduce its rates to secure this business, it is believed by several lines that even though they have been appointed freight forwarders by the Central Railroad of Brazil, they are performing no service whatsoever for our member lines and therefore are not entitled to brokerage" (R. 208).[3]

The next day, the special meeting was held, at which "it was proposed that no brokerage be paid on the 120 locomotives . . ." and "on ballot vote the proposal was approved" (R. 209).

The foregoing actions were taken in secret and petitioner did not learn of them until it had occasion to submit brokerage bills covering locomotives booked with Moore-McCormack Lines and I. F. C. Lines (two of the Conference carriers) (R. 167-8). Lloyd Brasileiro had previously refused to pay, for stated reasons which made no mention of the Conference action (R. 164); but the answer in the proceeding before the Maritime Board (R. 46), as well as a considerable body of documentary proof[4] establish that the refusal of the Conference carriers to pay brokerage was the direct consequence of the Conference action of June 12, 1952 (R. 167-8, 208-9). Indeed, the Conference admitted that any forwarder who had not competed for cargo, would have received brokerage for services similar to those which petitioner rendered (R.

[3] The assertion that petitioner had undercut existing Conference rates was false (R. 146-7). There were no existing Conference rates (R. 142-4), or if there were, the Conference had unlawfully kept them secret (R. 141).

[4] Brokerage was actually paid on spare parts (R. 85-6) which moved under the same terms as the locomotives (R. 87, 146-7). The brokerage bills were audited and explicitly approved as to parts while being disapproved as to locomotives (R. 85-8, 177-9).

140).[5] The record is thus conclusive that the denial of brokerage was solely a gesture of retaliation against a competitor or potential competitor, and that its purpose was to force the competitor from the Conference sea-lanes.[6]

The Maritime Board held that even though the Conference had acted illegally, the petitioner could not recover its damages (which were claimed in the amount of brokerage denied—i. e., $11,647.12). The Court below affirmed the Board, substantially on the Board's own grounds, which, as already noted, were that brokerage would have constituted a rebate because no fee had been charged against the consignee and that in any event, brokerage was not "earned" (Appendix B, pp. 11-13).

Further facts are set forth in ensuing sections of this petition.

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[5] In its capacity as forwarder-broker, petitioner communicated with the locomotive manufacturers, obtained production schedules, made arrangements necessary to schedule the shipments (R. 156-8), made the bookings—i. e., reserved space on the Conference vessels, scheduled shipment of the locomotives (including spare parts) from inland origins to shipside, coordinated such shipments with vessel itineraries, documented shipments for export, prepared bills of lading, filed export declarations, procured certification of consular invoices, rearranged delivery schedules for the carriers' convenience when ships were delayed or rescheduled, retarded arrival of cargo at dockside when vessels were late, thereby minimizing the carriers' car-demurrage liability, and performed other activities of a related nature which served the interests and convenience of ocean carrier, shipper, and consignee (R. 79, 82-3, 99-100, 102, 106-7, 109, 111-12, 162-3, 169-70, 183-5). If these services had not been performed by a forwarder or broker, the carriers would admittedly have had to hire personnel to do the same work (R. 128). Compare *United States* v. *American Union Transport*, 327 U. S. 437, 442.

[6] The Conference chairman testified (R. 145):

> ". . . . it is not admitted that they (the Conference lines) have taken punitive action. It might have hurt a little, but we don't call that punitive."

Reasons for Granting the Writ

(a) Conflict of the Decisions Below With a Decision of This Court

On May 19th, 1958 (about a month after the decision of the Court of Appeals to which this petition relates), this Court in *Federal Maritime Board* v. *Isbrandtsen Company*, — U. S. —, 78 S. Ct. 851, considered the anti-monopoly provisions of the Shipping Act, stating (78 S. Ct. at p. 858):

> "But it must be emphasized that the freedom allowed conference members to agree upon terms of competition subject to Board approval is limited to the freedom to agree upon terms regulating competition among themselves. The Congress in § 14 has flatly prohibited practices of conferences *which have the purpose and effect of stifling the competition of independent carriers.*" (Italics added)

The Court also noted that Congress had

> ". . . struck the balance by allowing conference arrangements passing muster under §§ 15, 16, and 17 limiting competition among the conference members while flatly outlawing conference practices designed to destroy the competition of independent carriers" (78 S. Ct. at p. 859).

The *Isbrandtsen* doctrine was neither new nor radical. It merely recognized legislative intent as expressed with uncommon precision when the Shipping Act was before Congress. Mr. Byrnes, a member of the "Alexander Committee" which sponsored the bill, explained it thus on the floor of the House (53 Cong. Rec. 8087):

> "The regulatory features of this bill are agreed to by all fair-minded men. They are designed simply to

> enable an independent shipowner to carry on his business, without having the shipping trust drive him out by discriminatory or unfair practices."

Neither the Board nor the Court below heeded this policy in their decisions; although it was brought emphatically to the attention of both tribunals.

The petitioner's claim rests on section 15 of the Shipping Act, which requires that inter-carrier agreements "controlling, regulating, preventing, or destroying competition" be filed with the Board. The Board may approve or disapprove the agreements under stated conditions, but in the absence of approval, their performance is unlawful and subject to a penalty of $1,000 a day "to be recovered by the United States in a civil action"[7] (Appendix C, p. 2).

Section 22 of the Shipping Act authorizes the filing of complaints with the Board charging violations of the Act, and demanding "reparation for the injury" caused by such violations (Appendix C, p. 3). Petitioner's complaint charged a violation of section 15, and alleged specific injury resulting from the violation. It thus fulfilled all statutory requisites.

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[7] Section 15 accords an antitrust exemption to agreements which the Board approves. In *United States* v. *American Union Transport*, 327 U. S. 437, this Court said (p. 447, note 8):

> "It should not be necessary to emphasize, in view of the statute's plain language, that, as is indicated, the exemption arises *not* upon the mere filing of the agreement, but *only after approval* by the Commission." (Italics in original)

In conformity with this pronouncement, the petitioner sought antitrust damages in a district court before prosecuting its case before the Maritime Board. The Board intervened and moved to dismiss the antitrust suit on the ground that the Board had exclusive primary jurisdiction and power to afford a full remedy. The court agreed. *American Union Transport* v. *River Plate and Brazil Conferences* (D. C. N. Y., 1954), 126 F. Supp. 91, aff'd. 222 F. 2d 369 (2d Cir., 1955).

The Board and the Court below both found that the violations had occurred as alleged, but attached no consequences to the violation. The Board's examiner had recommended (in addition to reparation) that the facts be certified to the Department of Justice for appropriate action—*i. e.*, recovery of penalties—(R. 76) but the Board explicitly set the recommendation aside.

The conjunction of the Board's refusal to enforce penalties and its denial of reparation for proven injury had the effect of obliterating any meaningful distinction between an unlawful act and a lawful one, and of defeating the basic anti-monopoly objective of a major regulatory statute. We submit that no agency, and no court reviewing agency action, is free thus to nullify a legislatively-prescribed system of regulation.

The Board refused to apply the clear mandate of section 15 because of what was found to be a countervailing precept of section 16[8] as to which the Court below observed merely that "the courts are slow to interfere with the conclusions" of regulatory agencies "when reconcilable with statutory directions" (Appendix A, p. 10). The Court, however, made no analysis of the "statutory directions" which the Maritime Board had ignored. This Court's analysis of such directions in *Isbrandtsen* shows clearly that the Shipping Act was meant to forbid what the Board and the Court below have permitted. In these circumstances, the Court below was obligated to correct the Board's legal error. Compare *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

[8] As we show hereafter (pp. 11-14), the Board's interpretation of section 16 was incorrect.

(b) The Ruling That Payment of Brokerage Would Have Violated Section 16 of the Shipping Act

In ruling that section 16 of the Shipping Act had been violated, the Board said (Appendix B, pp. 11-12):

> "As we have seen, AUT performed freight forwarding services for the consignee without compensation therefor and relied upon brokerage from the carriers for its full compensation; i.e., for its services as a freight forwarder and for its services, if any, as a broker. Under this arrangement the consignee was to have property transported at less than the rate of the transportation therefor, together with the cost of the incidental services in connection therewith. This is the evil which Congress had in mind when it stated that it shall be 'unlawful for any . . . consignee, forwarder, broker . . . knowingly and willfully, directly or indirectly, . . . by any . . . unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than rates or charges which would otherwise be applicable.' The waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to the consignee to the extent that the brokerage payment included the cost of the freight forwarding services and therefore an 'unjust or unfair device or means.'"

On the same point, the Court of Appeals said (Appendix A, pp. 10-11) only that

> ". . . this determination by the Board was a matter committed to it as an expert in the field and that this court should not pit its view against that of the Board."

and that

> ". . . the Board *should have* authority to distinguish between the services of a broker and those of a freight forwarder and find that, under the circumstances of this case, § 16 had been violated." (Italics added)

The Board's reasoning was wrong on many counts, none of which was even considered by the Court below beyond its uncritical observation that the Board "should have authority" to distinguish between services of a broker and services of a freight forwarder. The question is not whether the Board should have authority, but whether it *does* have such authority and exercised it within permissible limits.

The germane portion of section 16 provides:

> "SEC. 16. That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, *knowingly and willfully*,[9] directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable." (Italics added)

It is clearly established that section 16 of the Shipping Act (and cognate provisions of the Interstate Commerce Act) are simply intended to prevent shippers, consignees, and their representatives from cheating carriers through specified types of fraudulent conduct. In *Armour Packing Co. v. United States*, 153 Fed. 1 (8th Cir., 1907), aff'd 209 U. S. 56, dealing with the Interstate Commerce Act, the Court said (p. 16):

> ". . . Obtaining transportation at a rate less than the regular published rate, without committing any

[9] It is difficult to understand how petitioner could have violated section 16 "knowingly and willfully" when the Board expressly conceded (Appendix B, pp. 13-14) such "want of clarity in prior Board decisions" that it gratuitously declined to "take any action" against petitioner. The Board's precedents hold that "knowingly and willfully" means "purposely and obstinately" and signifies intentional disregard of statutory requirements: *Misclassification of Tissue Paper*, 4 F. M. B. 483. See also *United States v. Illinois Central R. Co.*, 303 U. S. 239, 242-3.

> fraud or making any false representation to secure it, is not unlawful under this act of 1889."

In *Beaumont Port Commission* v. *Seatrain Lines*, 3 F. M. B. 556 (1951), the Board said of the Shipping Act (p. 563):

> "'Unfair device or means', coming at the end of a list of dishonest practices such as false billing, etc., must be construed as limited to practices of the same general class as those specifically mentioned. This is the rule of 'ejusdem generis'."

Here, the consignee paid the full rate negotiated with the Conference, *whose tariff authorized the payment of brokerage* (Appendix B, p. 4; R. 28-9, 44). Petitioner perpetrated no fraud whatever; it claimed only what the Conference tariff authorized and what Conference carriers *always* paid in similar circumstances. There was no suggestion that any brokerage money, if collected, would flow into the pocket of any shipper of the cargo, or of the consignee.

The false billing provision was prefixed to section 16 by amendment in 1936. The report of the House Merchant Marine Committee on the amendatory bill (H. R. Report No. 2598 to accompany S. 3467, 74th Cong. 2d Sess.) made explicit reference to brokerage, stating (p. 2):

> "* * * Suggestions were made to add a proviso that nothing in the act shall be construed to prohibit the payment by carriers of ocean freight brokerage to a bona-fide forwarder or broker. *It is not the intent of this committee that the act shall be construed so as to prohibit the payment by carriers of legitimate brokerage, and it is not believed that the language of the new matter as now drawn could by any possibility interfere with the payment of legitimate brokerage.* It is for this reason that a proviso to that effect is not added." (Italics added)

The quoted passage shows that Congress intended to *protect* (not to outlaw) "legitimate brokerage" to freight

forwarders. The only "non-legitimate" brokerage to which Congressional attention had been directed was brokerage paid to forwarders who were affiliates or "dummies" of a shipper—in which event the brokerage would diminish the net freight which the shipper paid. See *Hearings before the Merchant Marine and Fisheries Committee*, House of Representatives, on S. 3467, 74th Cong. 2d Sess., pp. 23, 24, 28. There was no affiliation between the petitioner and the shipper or consignee of cargo in this case. It thus appears that the Board and the Court below have construed section 16 as meaning the opposite of what Congress said it meant.

The Board has sought, by a novel and unwarranted misinterpretation of section 16, to construe it as a plenary grant of authority to regulate the forwarding industry. We think it clear that no such authority exists, and that in any event, the question whether it does exist and was exercised within permissible limits merits determination by this Court.[10]

(c) The Ruling That Damages Caused by a Conspiracy May Be Recovered Only When a Contract Right Has Been Infringed

The Court of Appeals said (Appendix A, p. 11):

> "The appointment of AUT as a broker by Central could not create any liability on the part of the ocean carriers. There was no agreement by the carriers authorizing the appointment, and certainly no agree-

[10] In *United States* v. *American Union Transport*, 327 U. S. 437, this Court held that freight forwarders were "other persons" as defined in section 1 of the Shipping Act (46 U. S. C. 801) and that they could be regulated under those provisions of the Shipping Act which pertained to such "other persons"—*i. e.* persons other than common carriers. The decision did not, however, indicate what activities of such "other persons" were subject to regulation.

ment by the members of the Conference to incur liability to AUT, with whom it had engaged in competition for the very business for which it now claims compensation by way of reparations. * * *"

This reasoning constituted one branch of the Court's bifurcate argument in support of the Board's position that brokerage had not been earned. It wholly ignores the significance of the admission in the pleadings and the overwhelming evidence that brokerage would have been paid if the conspiracy had not been organized and executed.[11] Both the Board (Appendix B, pp. 7, 9) and the Court below (Appendix A, p. 11) recognized that brokerage would have been paid but for the conspiracy. They were, therefore, rationally obligated to make the ultimate finding that the conspiracy injured the petitioner to an extent measured by the lost brokerage. But in lieu of such finding, the Court ruled that petitioner had suffered no damage because no carrier had made itself liable by contract to pay brokerage. This means that damages can be collected for injury flowing from conspiracy only where the conspirators impaired a claim existing under a contract. We are confident that no such rule exists, and that if it did exist, it would destroy the effectiveness of private remedies for damages under all antitrust statutes and similar enactments.

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[11] Paragraph 17 of the Conference answer in the proceeding stated (R. 46):

"They admit that *due to the Conference's action of June 12, 1952, the respondent lines* which transported the aforementioned 120 locomotives and parts therefor *refused and still refuse to pay brokerage to complainant* . . ." (Italics added)

The Conference chairman testified (R. 132) that forwarders render services of value to carriers and that if forwarders did not render those services, the carriers would have to employ additional personnel to render them (R. 128); that brokerage had been paid for such services "since time immemorial" at 1½% (R. 131); and that any person other than petitioner would have received brokerage for the same services which petitioner performed (R. 140).

Antitrust offenses do not result characteristically in the impairment of *contract rights*, but rather defeat the realization of ordinary commercial expectancies. When sellers combine to fix the sales price of a commodity, they do not ordinarily impair the contract rights of any purchaser, because in a typical case, the purchaser has no contract. The harm to the purchaser flows from his inability to purchase at the price he would have paid in the absence of the price fixing combination. See, for example, *American Tobacco Co.* v. *United States*, 328 U. S. 781. The damages suffered by the plaintiff sugar growers in *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219, were not caused by the breach of any contract, but by impairment of the prospect that the growers could have obtained better contracts if their customers had not conspired to fix uniform terms of purchase.

The concept of compensable injury should be no different under the anti-monopoly provisions of the Shipping Act than under the Sherman Act or the Clayton Act. Misconduct under the antitrust laws or any other type of anti-monopoly legislation constitutes a statutory tort. See *Farbenfabriken Bayer, A.G.* v. *Sterling Drug*, 153 F. Supp. 589 (D. C. N. J., 1957), and the relevant inquiry as to damage is (as in all other cases of tort) whether it was proximately caused by the defendant's tortious conduct. A victim knocked down by an automobile while crossing the street need not prove in a damage suit, that he was entitled *by contract* to reach the other side in safety. It is enough that he would normally have arrived intact if left alone. So here, it is enough that the petitioner would have received brokerage if the Conference had not restrained its members from paying it. Compare *Anderson* v. *Shipowners' Ass'n of Pacific Coast*, 272 U. S. 359.

It was improper, and inimical to the purposes of the Shipping Act, for the Board and the Court to erect arti-

ficial and unconventional barriers against petitioner's claim. In *Flintkote Company* v. *Lysfjord*, 246 F. 2d 368 (9th Cir., 1957), the Court said:

> "The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor complements the Government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction." (p. 398)

It seems particularly important to give a liberal interpretation to the reparation provisions of the Shipping Act in the circumstances here presented, where the Board refuses to enforce the penal provisions of the law, with the result that it must be enforced through private damage suits or not at all.

(d) Actions of the Board and the Court Below in Derogation of the Administrative Procedure Act

We believe that the Board's conduct of this case constitutes a catalogue of important abuses which the Administrative Procedure Act (5 U. S. C. 1001 ff.) was enacted to prohibit. For example:

1. Lack of notice of legal issues

Section 5 of the Administrative Procedure Act (5 U. S. C. 1004) provides that in cases of adjudication, the parties are entitled to notice as to the nature of the hearing and "the matters of fact and law asserted." The rules of the Federal Maritime Board also provide that answers to complaints "shall give notice of issues controverted in fact or law" (46 C. F. R. 201.65).

Although the Board decided that petitioner's claim was unlawful under section 16 of the Shipping Act, the answer

filed by the Conference in the Board proceeding tendered no such issue (R. 43-8), nor did the Board.[12] Consequently, no intimation of illegality arose until after the hearings were concluded. As to this, the Court below held (Appendix A, p. 12) that "the Board would not be precluded from disallowing compensation for an illegal act, whether the question was specifically raised or not."

This, of course, begs the issue. We need not deny that the Board could refuse compensation "for an illegal act." Under the Administrative Procedure Act, however, the Board could not decide that petitioner had acted illegally until petitioner had been notified that the legality of its conduct was in question[13] and until petitioner had been afforded an opportunity to contest the point.[14] See *Morgan* v. *United States*, 304 U. S. 1, 18, where this Court said:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one."

If an issue of legality had been seasonably tendered, the germane material could have been brought to the Board's attention. Although it was briefed for the Court below, the Court failed to discuss any statute, decision, or regulation on which the case depended. It cited only two

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[12] Compare *Service* v. *Dulles*, 354 U. S. 363.

[13] Section 23 of the Shipping Act (46 U. S. C. 822) provides that orders of the Board "relating to any violation of this chapter shall be made only after full hearing . . ."

[14] It is obvious that the Board was unacquainted with the pertinent legal authorities when it wrote its opinion. For example, the legislative history of the amendment to section 16 of the Shipping Act is not mentioned. Neither are any relevant decisions of the Board or of the courts.

cases having no specific bearing on any concrete element of the controversy.

2. Retroactive Rule Making

The Board ruled (and the Court agreed without analysis of the Board's ruling) that brokerage is a rebate to a shipper, prohibited by section 16. But until this pronouncement, the Board's rule was that—

> "The payment of brokerage by the carrier is not a payment to a shipper nor does the shipper in any way benefit from the payment."

That ruling was made in 1949 by the Maritime Commission (the Board's predecessor) in *Agreements and Practices re Brokerage* (Docket No. 657), 3 U. S. M. C. 170, 172—a decision affirmed by two three-judge district courts under the Urgent Deficiencies Act: *Atlantic & Gulf/West Coast Conference* v. *United States*, 94 F. Supp. 138 (S. D. N. Y., 1950); *Pacific Westbound Conference* v. *United States*, 94 F. Supp. 649 (N. D. Calif., 1950).

While the Board's reasoning turns on the non-collection by petitioner of a fee from the cargo interests,[15] the evidence in Docket No. 657 clearly revealed the practice which the Board now condemns.[16]

Despite such evidence, the Commission held that conferences could not outlaw brokerage to forwarders. The present case is an unheralded abandonment of that ruling.

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[15] There is no suggestion as to how such a fee should be measured.

[16] The following appears at page 1256 of the record in Docket 657:

> "Q. Did Guggenheim Bros. [a shipper] compensate the broker by any payments with their own funds? A. None whatsoever.
>
> "Q. The sole compensation he derived was from brokerage paid by the steamship companies? A. That is correct."

The Board purports to find the Conference boycott illegal but under the decision, the illegality has no practical consequence and the decision has no deterrent force.

The Board has long had a published rule on brokerage (46 C. F. R. 244.13) which tells when it may and may not be paid. The rule gives no hint that the forwarder must make a charge against shipper or consignee.

In this state of the Board's rules and precedents, it is obvious that the Board's decision in this case reverses an old rule by substituting a new and different rule; and that the new rule is applied retroactively to transactions which occurred six years before the case was decided. The Board's action was arbitrary and capricious. Since the Board gave no advance notice of its intentions, the new rule is void as applied to petitioner.

Section 3 of the Administrative Procedure Act (5 U. S. C. 1002) requires Federal Register publication of "substantive rules" and "statements of general policy" adopted. Section 4 of the Administrative Procedure Act (5 U. S. C. 1003) requires advance notice of rule making by federal agencies, with opportunity for interested persons to participate in the rule making process by the submission of "written data, views, or arguments . . ." Upon final adoption of a new rule, it must be published (except in emergencies) at least 30 days ahead of its effective date. None of the procedures thus prescribed were observed in connection with the decision here involved.

The Board's action violated not only the Administrative Procedure Act, but also the rule formulated by this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 92:

> "But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of

conduct prescribed by an agency of government authorized to prescribe such standards . . ."

The collection of brokerage in the circumstances of this case was expressly sanctioned by the Board's existing rule and was an established trade practice (R. 131-2, 139).

The Board tacitly conceded that its decision constituted a rule making activity when, six days before issuance of its decision in this case, it published in the Federal Register (22 F. R. 1779, March 19, 1957) a *proposed* revision of its old rule on brokerage. The proposed rule includes provisions indistinguishable from those incorporated in the decision here in controversy. The new proposals, however, remain proposals only, having not yet been adopted for general application. The result is that petitioner alone is subject to the restrictions in question. So far as appears, all other forwarders are still free to receive brokerage whether or not they have collected a fee from the cargo interests. The result is discriminatory, unfair, and unlawful.

CONCLUSION

The errors above cited relate to matters of substantial public interest and importance and invite review and correction by this Court. Accordingly, this petition for writ of certiorari should be granted.

Respectfully submitted,

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July 22, 1958